IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-10-0226

PARK PLACE APARTMENTS, LLC,
Plaintiff / Appellant,

v.

FARMERS UNION MUTUAL INSURANCE COMPANY, WILLIAM F. WILHELM, and MONTANA FARMERS UNION INSURANCE AGENCY, INC.,
Defendants / Appellees.

and,

WILLIAM F. WILHEM,
Third-Party Plaintiff,

v.

WHITEFISH INSURANCE AGENCY, INC., A Montana Corporation,
Third-Party Defendant.

ANSWER BRIEF OF APPELLEE FARMERS UNION MUTUAL INSURANCE COMPANY

ON APPEAL FROM THE ELEVENTH JUDICIAL DISTRICT COURT FLATHEAD COUNTY, THE HON. STEWART E. STADLER PRESIDING

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I. STATEMENT OF THE ISSUES

Appellee Farmers Union Mutual Insurance Company (FUMIC) restates the issues as follows:

A. Did the District Court correctly conclude that the policy did not cover the carport, because the policy defines covered property as "the buildings and structures at the premises described in the declarations" and the premises described in the declarations include two other buildings but not the carport?

B. Did the District Court correctly conclude that Wilhelm did not have a duty to Park Place to procure coverage for the carport, because no such coverage was requested, and therefore was not negligent?

II. STATEMENT OF THE CASE

The Statement of the Case in the brief of appellant Park Place Apartments, LLC (Park Place) is generally correct. However, the procedural history Park Place sets out regarding the change of venue from Cascade County to Flathead County (Brief, pp. 3-5) is both incomplete and irrelevant, as Park Place has not appealed the order changing venue.

Further, Park Place mis-states FUMIC's grounds for summary judgment, specifically its position regarding the amendatory endorsement known as BOP 54.

(Brief, p. 5.) FUMIC's position in the District Court, as noted and adopted in the District Court's order, has always been that the endorsement did not change coverage for the carport because the carport was never covered. (FUMIC's Motion for Partial Summary Judgment and Brief in Support, p. 17; Order and Rationale on Pending Motions, p. 3.)

In addition, Park Place fails to note the addition of two other parties to the case and the status of summary judgment motions involving those parties. On October 28, 2009, Park Place amended its complaint to add as a defendant Montana Farmers Union Insurance Agency, Inc. (MFUIA), the entity with which Wilhelm had an agency relationship, asserting that if FUMIC was not liable for Wilhelm's negligence, MFUIA was. (See Amended Complaint.) On October 16, 2009, Wilhelm amended his answer to assert third-party claims against Whitefish Insurance Agency (WIA), alleging that WIA was the agent for the policy renewal in effect at the time the carport collapsed and that if any breach of duty and negligence occurred, liability should be imposed on WIA, not Wilhelm. (See Third Party Complaint.) Following the District Court's order granting summary judgment to FUMIC and Wilhelm, MFUIA and WIA filed similar motions which have not been ruled upon. On June 23, 2010, the District Court certified that there was no just reason for delay under Rule 54(b), M.R.Civ.P. (See Order Granting Rule 54(b) Certification.) On July 13, 2010, this Court issued an order accepting the case for appeal.

III. FACTS

The policy:

Farmers Union Mutual Insurance Co. (FUMIC) issued Park Place Apartments, LLC (Park Place) a Businessowners Policy providing property and liability coverage. The initial policy period was May 1, 2001 to May 1, 2002. The policy was subsequently renewed several times and was in place on February 10, 2008, the date of loss. The insured premises remained the same in the declarations for each policy. That is, during each policy period, the insured premises were identified as the 24-unit apartment building and a laundry room/storage facility, both at 601 Park Avenue, Whitefish. Although the dollar value of the limits of coverage changed over time, the limits section of the declarations likewise identifies the same two buildings. (FUMIC's Motion for Partial Summary Judgment and Brief in Support, ¶¶ 1, 3 (FUMIC MPSJ), and Affidavit of Douglas J. Wold with attached declarations pages, Docs. FUMIC 582-584.)

The declarations page for the Businessowners Policy in effect at the time of the carport collapse describes the property insured as two buildings, the 24-unit apartment building and a laundry room/storage facility. It states limits of insurance for those two buildings only. The pertinent sections read as follows:

///

"INSURED PREMISES

LOC #	BLDG #	ADDRESS
BUSINESS DESCRIPTION:		APARTMENT - 24 UNITS
1	1	601 PARK AVENUE WHITEFISH MT 59937
BUSINESS DESCRIPTION:		LAUNDRY ROOM & STORAGE
1	2	601 PARK AVENUE WHITEFISH MT 59937

The declarations then define the coverages and limits as follows:

COVERAGES	LIMITS	LIMITS
LOC. 1 BLDG. 1	LOC. 1 BLDG. 2	
BUILDING	$932,000	$31,000
REPLACEMENT COST OPTION (YES/N0)		
YES	YES	
BUSINESS PERSONAL PROPERTY		
$25,000"		

(FUMIC MPSJ, ¶ 1; Declarations pages, Docs. FUMIC 101-103.)

The Businessowners Coverage Form, which is the basic policy form, provides that property–which may be a Building or Personal Property–is covered if it is "at the premises described in the declarations" and if the declarations show a limit of insurance for it. The policy states as follows:

> "**SECTION I – PROPERTY**
> **A. Coverage**
> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.
> **1. Covered Property**
> Covered Property includes Buildings as described under Paragraph **a.** below, Business Personal Property as described under Paragraph **b.** below, or both, depending on whether a Limit of Insurance is shown in the Declarations for that type of property. Regardless of

whether coverage is shown in the Declarations for Buildings, Business Personal Property, or both, there is no coverage for property described under Paragraph **2.** Property Not Covered.
a. Buildings, meaning the buildings and structures at the premises described in the Declarations, including:
(1) Completed additions;
(2) Fixtures, including outdoor fixtures;
(3) Permanently installed:
(a) Machinery; and
(b) Equipment;
(4) Your personal property in apartments, rooms or common areas furnished by you as landlord; ...."

(FUMIC MPSJ ¶ 2; Businessowners Coverage Form, Sect. 1 – Property, A. Coverage, 1. Covered Property, Doc. FUMIC 109.)

The language in the Businessowners form used in 2001 is not the same as in the 2007-08 policy. However, it just as clearly limits coverage for Buildings in the same way. It states as follows:

"**A. COVERAGE**
We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.
1. Covered Property
Covered Property, as used in this policy, means the following types of property for which a Limit of Insurance is shown in the Declarations:
a. Buildings, meaning the buildings and structures at the premises described in the Declarations, including:
(1) Completed additions;
(2) Permanently installed fixtures, machinery and equipment;
(3) Your personal property in apartments or rooms furnished by you as landlord; ...."

(FUMIC MPSJ ¶ 4; Businessowners Special Property Coverage Form, A. Coverage, 1. Covered Property, Doc. FUMIC 609.)

The apartment complex entity is owned by Whitefish attorney William Hileman. In anticipation of acquiring the property, Hileman called Whitefish insurance agent William F. "Bud" Wilhelm to purchase insurance for the complex. Hileman chose to purchase insurance from Wilhelm because he had been doing business with Wilhelm on other properties he owned and had purchased other Farmers Union policies for those properties from him. Hileman had been doing business with Wilhelm for more than 10 years. (FUMIC MPSJ ¶¶ 5-8.)

Wilhelm became a FUMIC agent in Whitefish in 1977 and retired in 2003. Wilhelm does not recall Hileman coming to see him about buying coverage for Park Place or what kind of coverage Hileman wanted. Wilhelm's memory has been affected by health problems. (FUMIC MPSJ ¶¶ 9-10.)

Hileman testified that he told Wilhelm he was purchasing the property and would like to buy insurance. Wilhelm agreed and said he had to take a look at the property. Wilhelm then filled out an application form which Hileman signed. Hileman testified that he requested what he now calls "full coverage" for the property, and discussed policy limits with Wilhelm. He wanted both liability and property casualty coverage, but acknowledges that does not know what terms he used at the time, that is, whether he in fact instructed Wilhelm to obtain "full coverage." (FUMIC MPSJ ¶¶ 11-12.)

No documents identify the carport as a covered building or as the insured premises. Wilhelm and Hileman both signed the application, dated April 30, 2001. The handwritten application identifies the "Location of Premises to be Insured" as follows:

LOCATION OF PREMISES TO BE INSURED

Prem. No.	Bldg. No.	Address of Premises, City, State & Zip Code	Occupancy of Premises
1	1	601 Park Ave Whitefish	APT. 24 unit
	2	Same - storage & lau.	

Building 2 was the storage and laundry building; it appears that Wilhelm also wrote the "occupancy" or use of the building in the block for the address by mistake. No carport was listed.

The next section of the application specifies the limits requested and states as follows:

LIMITS OF PROPERTY COVERAGES - (Values Shown should be 100% of Actual Cash Value or Replacement Cost)

Prem. No.	Bldg No.	Building Limit	ACV Option	Automatic Increase %	Rate No.	Building Construction	Business Personal Property Limit	Rate No.	Protection Class	Business Income Limit
1	1	$750,000		%	18	F	$25,000	18	4	$
	2	$25,000		%					4	

The application also lists the mortgagee as Whitefish Credit Union and again identifies only one premise and two buildings. (FUMIC MPSJ ¶ 13.) No carport is listed.

Hileman testified that when Wilhelm brought the application to him to sign, Hileman noticed that it referred to Building No. 1 and Building No. 2, and asked what those designations referred to. Wilhelm explained that Building No. 1 was the main apartment building and Building No. 2 was the laundry/storage facility. Hileman testified that Wilhelm told him Building No. 2 would have been covered anyway as an other structure, but that Farmers liked to see the buildings where people would be coming and going to be set out specifically. Hileman acknowledged that there was no specific discussion about the carport. He believed that the carport was covered because he intended to buy coverage for the entire complex, not just for some buildings or structures and not for others. Hileman did not ask Wilhelm whether the carport should be listed as Building No. 3. (FUMIC MPSJ ¶¶ 14, 16.)

The appraisal Hileman obtained before closing states the market value of the entire property, then appraises each of the three buildings separately. It provides a market value for the carport of $46,200 and for the laundry at $19,638. Despite that knowledge, Hileman did not suggest to Wilhelm that given the value of the carport, it should be listed as Building No. 3. (FUMIC MPSJ ¶ 17.)

Hileman believed he understood the application before he signed it. He admits that the word "carport" is not on the application. (FUMIC MPSJ ¶¶ 15, 18.)

Wilhelm acknowledged that the declarations page is prepared by FUMIC based on what the agent submits. He agreed that the policy defines what's included. He does not remember why he did not list the carport under buildings. He cannot say whether he had any intention of separating or excluding the carport. The drawing submitted with the application, apparently drawn by Wilhelm, does not show a carport. He does not remember if there was a carport, even though he drove by the site regularly; he simply does not know what he knew about the carport in 2001. (FUMIC MPSJ ¶¶ 19-21; FUMIC Reply, ¶ 18.)

Park Place suggests that coverage is somehow affected because a photo Wilhelm sent FUMIC shows a portion of the carport. Juanita Merriman, a commercial underwriter with FUMIC, is responsible for confirming that applications for Businessowners policies like this one are complete and for mailing out renewal notices and policy changes. She testified that agents take photographs "[s]o we can see what condition the building is in as underwriters. We like to see what buildings that are there, what condition they are in, but we don't view it as our responsibility to make sure all the buildings in the picture are covered. Because sometimes we can't tell whether it belongs to the property next door." (FUMIC Reply, ¶¶ 1-2, pp. 2,3.).

In response to the application, FUMIC's underwriting department sent Wilhelm a "Commercial Lines Quotation and Proposal." It parallels the application and lists two buildings, one with a limit of $750,000 and one with a limit of $25,000. (FUMIC MPSJ ¶ 22; Docs. FUMIC 241-244.)

The policy and declarations page issued parallel the application and the quotation and proposal. (FUMIC MPSJ ¶ 23; Docs. FUMIC 580-634.) Contrary to Park Place's suggestion (Brief, p. 17), there is no evidence of any underwriter decision to exclude a portion of the property.

Hileman received and kept a copy of the "New Business Declaration" for the policy period May 1, 2001 to May 1, 2002. He read it and believed he understood it. It lists the "Insured Premises" and Coverages and Limits exactly as set out in the declarations page. In other words, it lists two buildings at one location, and describes Building No. 1 as a 24-unit apartment, and Building No. 2 as laundry room and storage. Hileman testified that he knew by reading the "New Business Declaration" that the carport was not described in the declarations. He did not ask Wilhelm why. (FUMIC MPSJ ¶¶ 24-26; Doc. P166.)

The policy renewed each year on the same terms. The declarations page remained the same for all subsequent policy years, describing Buildings 1 and 2 as the apartment building and laundry and storage facility, with no carport. (FUMIC MPSJ ¶¶ 27-28.)

Endorsement, BOP 54

Park Place argued below that an endorsement issued with the 2005 renewal, known as BOP 54 (Businessowners Policy 54, Doc. FUMIC 712), eliminated coverage for the carport provided by the 2001 policy.

BOP 54 provides in part as follows:

> **"THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**
>
> **BUSINESSOWNERS AMENDATORY ENDORSEMENT**
> This endorsement modifies insurance provided under the following:
> **BUSINESSOWNERS COVERAGE FORM**
> **********
> **SECTION 1 – PROPERTY, A. Coverage, 2. Property Not Covered,** is amended to include:
> **i.** Buildings for which no limit of insurance is shown in the declarations.
> **j.** Underground pipes, flues or drains.
> ..."

The above section (i) is relevant because the carport was a building for which no limit of insurance was shown in the declarations. The endorsement also refers to four other sections, deleting two and amending two. (FUMIC MPSJ ¶ 33; Doc. FUMIC 175.) Those sections are not relevant to this appeal.

BOP 54 applied to all purchasers of this Businessowner's coverage form. It was not designed specifically for Park Place Apartments. (FUMIC MPSJ ¶ 34; Affidavit of Tom Barker.)

Mailing BOP 54

Hileman denies receiving a copy of BOP 54. He admits, however, receiving the 2005 declarations page and renewal form, which lists the applicable endorsements. He confirmed that the mailing address shown on the declarations pages was the correct mailing address for Park Place, and agreed that "if documents were mailed to that address, I would expect that I would have received them." (FUMIC MPSJ ¶¶ 30-31.)

Merriman is responsible for mailing out renewals, including declarations pages and endorsements, and policy changes. She testified in detail about FUMICs mailing practices, including when renewals and declarations pages are sent, when complete policies are sent, and when endorsements are sent. Based on her knowledge of those practices, she is reasonably certain, and believes it more likely than not, that the declarations pages and the endorsements listed thereon were sent to Park Place Apartments, LLC at 204 Central Ave, Whitefish, in April or May of each year from 2001 through 2008. She also believes that policies were mailed in 2001, 2005, and 2006. Further, she believes that no mailings to Park Place were ever returned to FUMIC as undeliverable. She believes that FUMIC sent Park Place the 2005 renewal declarations and forms listed before the renewal for the May 1, 2005 to May 1, 2006 policy period, with a complete copy of the policy–that is, all forms and endorsements,

including BOP 54; the complete policy was sent to each Businessowners policy holder that year because the majority of the forms had been changed. (FUMIC MPSJ ¶ 32, and Affidavit of Juanita Merriman; FUMIC Reply, ¶¶ 1, 6-7, 10-17.)

Carport collapse and coverage denial

The carport collapsed in February 2008. Hileman requested replacement cost coverage for the carport. FUMIC Assistant Vice President of Claims Tom Barker denied the request. Barker's letter notes that the declarations page lists the two buildings, the 24-unit apartment building and the laundry/storage facility, and does not list the carport. The letter also mentions BOP 54, which adds a section to the language in the policy that identifies property not covered. It concludes by saying that "With the above information in mind [that the carport was not listed on the declarations page, and BOP 54], we have no other alternative than to respectfully deny your claim for damage to the carport. The carport had no limit of insurance shown on your declaration page." (FUMIC MPSJ ¶ 35; Docs FUMIC 319-22 and 109-10.)

Barker denied coverage because the declarations page identified only two buildings as the insured premises, and did not include the carport. That was always the case from the time the policy was purchased; none of the declaration pages ever issued covered the carport. BOP 54 did not change coverage because the carport had

never been identified as an insured premises. Barker testified that BOP 54 was "icing on the cake." The language he quoted from BOP 54 says *property not covered* is amended to include buildings for which no limit of insurance is shown in the declaration. That language does not imply that the buildings were previously covered despite the absence of a limit of coverage for them in the declarations. In short, the policy did not include the carport "[b]ecause the carport was not described as a building on the insured premises," the definition of covered property. The declarations do not describe the "insured premises" as the property address, but as the two buildings identified at that address. (FUMIC MPSJ ¶¶ 36-37, 40.)

Merriman also testified that BOP 54 did not change coverage, but "was a clarification that there was no coverage for buildings at the premise unless there was a value listed in the policy." (FUMIC Reply, ¶ 19.) No value was listed for a carport.

None of the original premium was attributable to the carport. (FUMIC MPSJ ¶ 39.)

FUMIC paid for clean up and removal of debris and for damage to tenants' cars under liability provisions not at issue here. Park Place seeks replacement costs for the carport itself. (FUMIC MPSJ ¶¶ 41-42.)

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IV. STANDARD OF REVIEW

The court reviews rulings on summary judgment *de novo*, using the same standards applied at the District Court level to determine whether genuine issues of material fact exist, under Rule 56(e), M.R.Civ.P. Conclusions of law are reviewed for correctness.[1]

V. SUMMARY OF ARGUMENT

FUMIC's policy defines "covered property" as "the buildings and structures at the premises described in the declarations." The declarations unequivocally describe the insured premises as two buildings–a 24-unit apartment building and a laundry/storage facility–located at 601 Park Avenue, Whitefish. Contrary to Park Place's assertions, the insured premises are never described by address alone, but always by reference to specific buildings at the address. The policy also states that "covered property" is only property for which a limit of insurance is shown. The policy never showed limits of liability for the carport. The carport simply was never covered.

The District Court correctly held that BOP 54, the amendatory endorsement issued in 2005, did not change coverage under this policy because the carport was

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[1] *Smith v. Burlington Northern*, 2008 MT 225, ¶ 10, 344 Mont. 278, 187 P.3d 639, citing *Rich v. Ellingson*, 2007 MT 346, P 12, 340 Mont. 285, 174 P.3d 491.

not covered in the first place. Further, the endorsement made no changes that were relevant in any way to the collapse of the carport. BOP 54 was a form endorsement that modified some provisions and deleted others. Its effect on policies like Park Place's was purely technical, to make the language of the section defining *property not covered* consistent with the section defining *covered property*. It did not change the definition of covered property, and did not change or reduce coverage for Park Place.

The District Court ruling did not address Park Place's arguments about notice because it held that coverage never existed and so was not changed by BOP 54. That decision was correct. If notice is at issue, a two-step analysis applies: 1) does the policy modification constitute a change requiring notice under Sect. 33-15-1106, MCA, and 2) was adequate notice provided? In light of the nature of BOP 54 and the evidence of mailing, this Court can decide as a matter of law that no notice was required, or that if it was, reasonable minds would not disagree that a copy of the endorsement was mailed, and provided sufficient notice.

The issue of an insurance agent's standard of care is raised for the first time on appeal. It affects FUMIC only because Park Place argues that Wilhelm's negligence should be imputed to either FUMIC or MFUIA, an issue not decided below. No new standard is necessary, because Park Place's written application makes clear exactly

what coverage Park Place requested of FUMIC. If this Court finds questions of duty or negligence, under either the existing standard of care or a new standard, those questions should be remanded to the District Court for further consideration.

VI. ARGUMENT

A. The District Court correctly concluded that the policy provided no coverage for the carport because it did not fall within the definition of covered property, granting FUMIC's motion for summary judgment and denying Park Place's motion.

1. The definition of covered property is clear and does not include the carport.

The policy language, including the declarations, defines what is and isn't covered property. The carport was simply never covered. Park Place opens its argument by discussing the construction of exclusions and ambiguities. This case is about the definition of coverage–and not about exclusions or ambiguities.

When the language is clear, no amount of argument and no erroneous assumptions by the policyholder create an ambiguity. Montana law has long provided that "[A]n ambiguity exists only if the language is susceptible to at least two reasonable but conflicting meanings."[2] Only then do interpretation or construction come into play. As this Court has said, "[w]hile our general rule is to interpret any

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[2] *Mary J. Baker Revocable Trust v. Cenex Harvest States*, 2007 MT 159, ¶ 20, 338 Mont. 41, 164 P.3d 851; accord, *Giacomelli v. Scottsdale Insurance Co.*, 2009 MT 418, ¶ 32, 354 Mont. 15, 221 P.3d 666.

doubts as to coverage in favor of the insured, we do not do this where the terms of the policy are not ambiguous. If the language of the policy is clear and explicit, we do not rewrite it, but enforce it as written."[3] Further, this Court has noted that a policyholder's expectations contrary to the clear language of the policy "are not 'objectively reasonable.'"[4]

While inconsistent provisions can create an ambiguity, there are no such provisions here. Park Place cites the Illinois federal court's decision in *Accenture,*[5] a dispute over whether a tenant who was required to pay the property taxes on a leased building had been improperly charged taxes for the parking garage. The court noted that some provisions in the lease defined "building" to mean only the office space, while others referred to parking "in the building," suggesting that building included the garage.[6] Thus, the court held the lease ambiguous and the definition of building a disputed question of fact that could not be decided on summary judgment.

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[3] *Counterpoint, Inc. v. Essex Ins. Co.*, 1998 MT 251, ¶ 13, 291 Mont. 189, 967 P.2d 393 (cites omitted), affirming that all portions of a policy must be read together, and finding the definition of coverage not ambiguous.

[4] *Id.*, 1998 MT 251, ¶ 18 (cites omitted).

[5] *Accenture, LLP v. CSDV-MN Ltd. Partnership*, 2007 U.S. Dist. LEXIS 85211 (N.D. Ill., dec. Nov. 19, 2007). (Park Place cited the case below and in its brief on appeal without providing a copy; a copy is attached.)

[6] *Id.*, slip opinion, p. 3.

That is not the case here.

a. The policy language expressly identifies only two buildings as the "insured premises." FUMIC's policy language defines both "covered property" and "property not covered." Sect. I.A.1.a of the policy states that when covered property is buildings, that means "the buildings and structures at the premises described in the Declarations." (See Businessowners Coverage Form, Sect. 1 – Property, A. Coverage, 1. Covered Property, a., Doc. FUMIC 109.) The declarations pages for this policy–mirror images of the application–expressly describe the "insured premises" as two specific buildings–the 24-unit apartment building and the laundry/storage facility–at 601 Park Avenue, Whitefish. (See Declarations, Docs. FUMIC 101-103.) The declarations for the policy in effect at the time of the collapse are the same as those for the initial policy. The carport simply is not property–whether building or structure–"described in the Declarations."

Park Place argues that the insured premises is the entire property at 601 Park Avenue. It is certainly possible, and acceptable, for a policy to describe the "insured premises" by reference to a property address, without specifying the buildings or structures covered. That is the situation contemplated by the Insurance Services Office (ISO) guidelines Park Place cites. The ISO guidelines make a general statement that "one common method of 'describing' the covered buildings and

structures is simply to provide the street address of the property." (Brief, pp. 18-20.) No doubt this is true. The Manual then says that *if that method is used, and* the description is a simple street address, *and* there is more than one building, then all would be covered. (Park Place Cross-Motion for SJ, Exh. 9, FUMIC Doc. 324.) Again, that may well be true–*but that's not this policy.* This policy defines covered property as that described in the declarations, which specifically describe two buildings at that address.

Park Place argues on appeal that "adding" two specific buildings to the declarations, omitting the third, created an ambiguity which should be construed against FUMIC. An omission does not create an ambiguity unless the remaining terms are unclear–which is not the case. A glance at the declarations page demonstrates Park Place's mistake. The only place the property address–601 Park Avenue, Whitefish–appears is within the definition of insured premises, *underneath the description of the specific building or structure.* In other words, the insured premises are clearly defined as the 24-unit apartment building at 601 Park Ave *and* the laundry room and storage facility at 601 Park Ave. Nowhere is the address alone ever used. It is simply not reasonable to assume that the property covered was described as any and all property at that address.

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Park Place's argument about whether the carport is a structure or a building is immaterial because the policy language defines covered property to include both *if they are at the premises described in the declarations.* The distinction–made in some homeowners' policies and apparently on Hileman's mind when he assumed the carport was covered–is not part of this policy and never came into play in FUMIC's denial of coverage. That the carport was not a fully enclosed building simply had nothing to do with whether it was or wasn't covered. FUMIC denied coverage because the carport was not described as insured premises.

b. The policy provides no limits of coverage for the carport. Further, Sect. I.A.1. of the policy states that "Covered Property" includes covered buildings and business personal property, or both, "depending on whether a Limit of Insurance is shown in the Declarations." See Businessowners Coverage Form, Sect. 1 – Property, A. Coverage, 1. Covered Property, Doc FUMIC 109. In other words, the policy covers only property for which a Limit of Insurance is shown in the declarations. Here, of course, the declarations provide a limit of insurance for only the apartment building and the laundry and storage facility–and not the carport. Thus, the carport is not covered for a second reason.

And as the uncontroverted evidence below establishes, no premium was allocated to the carport. Park Place did not pay for insurance on the carport.

c. ***No other basis for coverage exists.*** Hileman noticed that only the apartment building and laundry and storage facility were identified on the application, which he signed, as well as on the Quotation and Proposal and the New Business declarations. He acknowledges he never asked about the carport, but assumed it was also covered. Had he asked, the policy issued could have been changed to specify the carport as part of the insured premises. He would have paid an additional premium and obtained coverage.

But Hileman's mistaken belief does not create either coverage or an ambiguity to be resolved in favor of coverage. He acknowledges that he did not specifically ask Wilhelm about the carport or confirm coverage. If Wilhelm mistakenly or falsely represented that the laundry building would have been covered anyway–leading to Hileman's erroneous conclusion–that error was Wilhelm's, not FUMIC's. Settled authority holds that an agent's assurance "does not 'create' or extend coverage beyond those covered risks expressly identified in the policy."[7]

Park Place's suggestion that the carport was not listed because FUMIC only wanted buildings identified if people were coming and going from them (Brief, p. 9)

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[7] *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 47, 304 Mont. 356, 22 P.3d 631, citing Section 33-15-302, MCA, providing that an insurance policy states the entire contract between the parties, and that the insurer and its representatives may not make any agreements not stated in the policy.

is not logical. Obviously people come and go from a carport continuously. Nothing in the policy distinguishes property covered and not covered based on human foot traffic, and FUMIC asserted no such grounds in acknowledging coverage for the two buildings described but denying it for the carport. Again, if Wilhelm mistakenly failed to list the carport for that reason, he may be subject to liability–if in fact a duty existed–but his actions do not create coverage the policy does not provide.

Nor is there any evidence that the presence of the carport in a photo Wilhelm sent to FUMIC created coverage or imposed a duty on FUMIC to cover it or inquire why coverage had not been applied for. Merriman, in the underwriting department, testified that photos are used to confirm the existence and general condition of property for which coverage had been requested, but that the underwriters cannot not assume all buildings shown are to be covered or are even on the applicant's own property. Park Place provided no authority or evidence to the contrary.

The District Court correctly concluded that there are no genuine issues of material fact regarding coverage. The policy language and declarations are clear. The District Court's judgment should be affirmed.

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2. FUMIC made no reductions or changes in coverage affecting the carport and thus was not required to give policyholders notice of a change.

Park Place argues that BOP 54, an endorsement added in the 2005 renewal, reduced or eliminated coverage, and triggered notice requirements that were not met. The District Court correctly held that BOP 54 did not eliminate coverage because coverage never existed, and correctly did not reach the issue of notice..

a. BOP 54 did not eliminate or reduce coverage for the carport. Park Place's appeal brief argues that notice was required and not given, but skips the prerequisite: it does not demonstrate how BOP 54 might have changed or created coverage. Quite simply, BOP did not change coverage for the carport. The 2005-06 policy, like all policies FUMIC issued to Park Place, including the 2007-08 policy in effect at the time of the collapse, provided coverage only for the apartment building and laundry and storage facility. Sect. A., Coverage, says the policy applies to "Covered Property at the premises described in the Declarations." Under Sect. 1., Covered Property is described as property "for which a Limit of Insurance is shown in the Declarations," including buildings "at the premises described in the Declarations." (See Businessowners Special Property Coverage Form, A. Coverage, 1. Covered Property, Doc FUMIC 609.) The carport was not covered because "the premises described" were limited to the two other buildings, and no limit of insurance was shown.

BOP 54 simply expands the definition in another section–Sect. I.A.2, Property Not Covered–to specify that property *not* covered includes property for which no limit of coverage is shown. In effect, the change is redundant, because Sect. I.A.1., Covered Property, already specifies that covered property includes only property for which no limit is shown. As Barker testified, BOP 54 does not imply that coverage previously existed. The endorsement takes the extra step of making double-certain that the definitions of Covered Property and Property Not Covered mirror each other.

That the endorsement says it "changes the policy" and "modifies insurance provided" does not mean that property not described in the declarations or for which no limit is shown was previously covered. The endorsement was a form, not prepared specifically for Park Place; it refers to four other sections of the policy, deleting two and amending two. In Park Place's case, the endorsement did not change the policy or modify insurance provided because the building for which coverage is sought–the carport–was not included in the "premises described" *and* no limits were shown. The endorsement might have changed coverage in another policy, but not this one.

Barker's letter and testimony make clear that FUMIC denied coverage because the policy did not describe the carport as the insured premises and showed no limit of coverage for it. Both he and Merriman testified that BOP 54 served as a clarification, and nothing more.

In sum, BOP54 does not change coverage. It simply amended the definition of "property not covered" to be consistent with the definition of "covered property," a technical clarification. It had no effect on the status of the carport at Park Place. The effect of BOP 54 was not reached below because the District Court found no coverage existed. If reached, this Court may decide the issue for FUMIC as a matter of law.

b. The District Court correctly chose not to reach the issue of notice. Because it held that coverage never existed and had not been changed, the District Court did not need to consider whether FUMIC gave adequate notice of a change. That was correct.

If notice is an issue, however, it should be decided in FUMIC's favor. Merriman testified that she is "reasonably certain, and believes it more likely than not" that FUMIC mailed the endorsement, and testified in detail about FUMIC's business practices regarding mailing. She is "99 percent certain" that a copy of BOP 54 was mailed to Park Place care of Hileman, along with the renewal declarations containing the list of endorsements. She also testified that FUMIC's records show nothing was ever returned from the mailing address for Park Place as undeliverable. Hileman admits he received the renewal declarations with the list of endorsements, but can't find a copy of the endorsements themselves in his file and doesn't know

where else they'd be. In fact, he can't find any copies of policies or endorsements, even though his receipt of the renewals and declarations is wholly consistent with Merriman's detailed testimony of FUMIC's mailing practices. This may well call his filing practices into question. He acknowledged that the address FUMIC used was correct and that he regularly received mailings from FUMIC at that address.

What notice is required depends on the change and on the insured. Montana law requires 45 days notice by mail of renewals "on less favorable terms," unless the change is a result of "a classification change based on the altered nature or extent of the risk insured against." Sect. 33-15-1106, MCA. Merriman testified that the changes for Park Place's 2005 renewal resulted from a change in forms; that is not a change in classification, and thus 45 days written notice by mail was required. Hileman says he received a copy of the declarations page–establishing that FUMIC made a timely mailing–but denies receiving a copy of endorsement BOP54.

The Montana Supreme Court addressed adequate notice of policy changes in *Robertus.*[8] There, FUMIC changed the way it charged policy holders for UM/UIM coverage. It did not send a separate notice of the change. The declarations page provided the only indication of the change, no longer listing the amount of coverage

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[8] *Robertus v. Farmers Union Mutual Insurance Company*, 2008 MT 207, 344 Mont. 157, 189 P.3d 582.

provided for each vehicle separately, but stating next to each vehicle "included," with one total premium, which had changed, at the bottom of the list. The insured was injured and sought to stack UIM coverage. When FUMIC refused, the insured argued that the failure to give him statutory notice (then 30 days) of the change rendered the change void under Sect. 33-15-1106(1), MCA. This Court applied the two-step analysis set out in *Thomas*:[9] 1) Does the policy modification constitute a change requiring notice under Sect. 33-15-1106, MCA? 2) Was adequate notice provided? Ultimately, this Court held for the insured, because the change significantly reduced coverage, was not easy to understand, and could not have been understood from the notice given.

Applying that analysis here, the first question is whether the nature of the amendatory endorsement required notice. BOP54 did not reduce or eliminate coverage. It made a technical correction or clarification, so that two definitions–"Covered Property" and "Property Not Covered"–read the same. Thus, the 2005 renewal was not "on less favorable terms," and no notice was required.

Second, if notice was required, was adequate notice given? The notice required relates to the insured's obligation to read the policy, which "depends upon what is

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[9] *Thomas v. Northwestern Nat. Ins. Co.,* 1998 MT 343, ¶ 19, 292 Mont. 357, 973 P.2d 804.

reasonable under the facts and circumstances of each case." Those "facts and circumstances" include whether the insured is "unsophisticated" or "knowledgeable about insurance," and "the complexity of the provision at issue."[10] Here, the insured is a limited liability company controlled by Bill Hileman, a lawyer with more than thirty years in practice and an experienced owner of commercial property. In short, he is a man a jury is likely to find legally "sophisticated" and knowledgeable about insurance. The "provision at issue" is not terribly complex. In fact, even before the policy was issued, Hileman knew enough to ask why two buildings were identified as the property described–he simply didn't go far enough and ask about the third. Thus, what notice is "reasonable under the facts and circumstances of the case"–including both the nature of the "change," if any, created by BOP54 and the nature and knowledge of the insured–is a question of fact. Hileman's receipt of the declarations for every year that Park Place was insured by FUMIC establishes that the mailings Merriman described did occur. Evidence of business practices or "regularly conducted activity" are regularly admitted to show that the activity occurred.[11] The only question is whether the forms and endorsements were attached.

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[10] *Robertus*, ¶ 44.

[11] See Rule 803(6), M.R.E., the hearsay exception for "records of regularly conducted activity;" *Morse v. Cremer*, 200 Mont. 71, 647 P.2d 358 (1982) (attorney's billing records and related testimony were evidence of the work done and its value).

In light of the nature of BOP 54 and Merriman's testimony, this Court can decide as a matter of law that no notice was required, and further, to the extent notice may have been required, that reasonable minds would not disagree that the endorsement was mailed and provided sufficient notice. If not, then the adequacy of notice is a question for the trier of fact and the denial of Park Place's motion for summary judgment on this issue should be upheld.

B. The District Court correctly concluded that Wilhelm did not have a duty to Park Place to procure coverage for the carport and therefore was not negligent, granting Wilhelm's motion for summary judgment and denying Park Place's motion.

The issue of the agent's duty does not directly relate to FUMIC, except that Park Place alleges that Wilhelm's negligence should be imputed to FUMIC or MFUIA. The District Court did not decide whether Wilhelm was an agent of FUMIC or of MFUIA. It held that because Wilhelm owed Park Place no duty, Park Place's argument that Wilhelm's negligence should be imputed to FUMIC was also subject to summary judgment, dismissing the claim. (Order, p. 4.)

Park Place asserts in a footnote (Brief, p. 31, note 2) that at the point when Wilhelm completed the application for insurance, "he clearly was FUMIC's agent," citing *Monroe v. Cogswell Agency.*[12] *Monroe* was decided two months after the

[12] 2010 MT 134, ¶39, 356 Mont. 417, __ P.3d __.

District Court's decision here. Neither the facts nor the law on whether Wilhelm an agent of either FUMIC or MFUIA when the application was completed were argued below. Nothing in record indicates whether Wilhelm suggested coverage with other companies or obtained other quotes. In fact, Hileman went to Wilhelm with the request for what he termed FUMIC's "business pack" because he had purchased it for other properties, a fact that may affect whether the distinction between a soliciting agent acting for the insured and a procuring agent acting for the carrier applies.

If this Court finds questions of duty or negligence, under either the existing standard of care or the new standard advocated for the first time on appeal, those questions should be remanded to the District Court for further consideration.

C. Response to Amicus Curiae brief of Montana Trial Lawyers Association (MTLA).

MTLA's amicus brief addresses one issue: the standard of care for insurance agents, specifically "whether an insurance agent has a legal obligation to counsel or advise the insured as to [its] insurance needs." (MTLA Motion to Appear, p. 2) That issue does not directly relate to the policy interpretation questions involving FUMIC.

No new standard of care is necessary because this case can be decided under the existing standard, which focuses on what coverage was requested. There is no question what coverage Hileman applied for: he applied for the coverage described

in the application which he signed. If the application did not accurately reflect either his intent or his prior conversations with Wilhelm, he shouldn't have signed it. The written application may have superseded his prior conversations with Wilhelm; that issue has not been raised nor addressed.

If a new standard is adopted and applies retroactively to this case, Park Place's request that this Court enter summary judgment against Wilhelm "and therefore against FUMIC" (Brief, p. 33) should be denied and the case should be remanded to the District Court for consideration of all the facts in light of that standard.

VII. CONCLUSION

The District Court correctly concluded that the policy language here is clear and unambiguous, and did not provide coverage for the carport. It correctly held that BOP 54 did not change coverage because the carport was not covered in the first place.

The District Court did not address Park Place's arguments about notice because it held that coverage had never existed and so was not changed by BOP 54. That decision was correct. If the issue of notice is reached, then in light of the nature of BOP 54 and the evidence of mailing, this Court can decide as a matter of law that no notice was required, or that if it was, reasonable minds would not disagree that a copy of the endorsement was mailed, and provided sufficient notice.

If this Court reaches the question of an insurance agent's standard of care, it should apply the existing standard, which looks at what coverage was requested. No new standard is necessary, because Park Place's written application makes clear exactly what coverage Park Place requested from FUMIC. If this Court finds questions of duty or negligence, under either the existing standard of care or a new standard, it should not enter judgment for Park Place but remand for consideration.

The District Court's judgment should be affirmed.

DATED this 6th day of August, 2010.

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By: 

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CERTIFICATE OF SERVICE

Signature below is certification that on the 10th day of August, 2010 a true and correct copy of the foregoing document was placed in the U.S. Mail, first-class, postage prepaid to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(e) of the Montana Rules of Appellate Procedure, I certify that the foregoing Answer Brief of Appellee Farmers Union Mutual Insurance Company is printed with a proportionally spaced Times New Roman typeface of 14 point, is double spaced, and the word calculated by Corel WordPerfect is 7334, exclusive of the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

DATED this 6th day of August, 2010.

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